LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 11 1956
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955

No. ~~625~~ 78

JAMES C. ROGERS,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri.

MARK D. EAGLETON,
THOMAS F. EAGLETON,
3746 Grandel Square,
St. Louis 8, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

INDEX.

III.

Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. .....

JAMES C. ROGERS,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri.

To the Honorable The Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Supreme Court of Missouri in the above case. In this behalf, petitioner shows unto the Court:

OPINION OF THE COURT BELOW.

James C. Rogers, Plaintiff (Respondent), v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Co., a Corporation, Defendant (Appellant).

The opinion of the Supreme Court of Missouri is not yet reported but it appears at pages 439 to 449 of the Record and is set out verbatim in Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257 (3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Judgment of the Supreme Court of Missouri, Division No. 1, sought to be reviewed, was entered on the 14th day of November, 1955 (R. 437-438) and is set out in Appendix B.

Thereafter on the 28th day of November, 1955, the petitioner filed a Motion for Modification of the Opinion of the Court, and for a Rehearing, or, in the Alternative, Transfer to the Court En Banc (R. 449) and these are completely set out as Appendices C and D.

Thereafter on the 12th day of December, 1955, the Supreme Court of Missouri overruled the motion to modify the opinion of the Court and overruled petitioner's motion for rehearing and overruled petitioner's motion to transfer to the court en banc; and said judgment became final (R. 476). The order overruling said motions is contained in Appendix E.

Division No. 1 of the Supreme Court of Missouri upon its refusal to transfer the cause to the court en banc was the highest court of the state in which a decision could be had in said cause; and in said cause the petitioner specially set up and claimed a right under a Statute of the United States, namely, the Federal Employers' Lia-

bility Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Sections 51-60.

It is claimed that the decision of the state court under this federal statute "is not in accord with applicable decisions of this court."

QUESTIONS PRESENTED.

It being admitted by the pleadings (R. 2, 5) that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that by reason thereof, the petitioner and the respondent were at all times engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U. S. Code, secs. 51-60, the questions presented for review are:

(1) Whether, the petitioner who had no experience whatsoever in firing weeds along the respondent's right-of-way (R. 15) and who theretofore had never seen anyone attempting to do so (R. 15) was entitled to have the negligence of the respondent submitted to the jury where the uncontradicted evidence showed that the respondent required the petitioner (R. 20, 21, 88, 89, 90) to be upon said right-of-way in close and dangerous proximity to a passing train of the respondent which caused the fire to blow toward the petitioner and thus to endanger his safety (R. 23).

(2) Whether, the petitioner was entitled to have the jury consider the respondent's negligence in creating the aforesaid dangers, thereby causing the petitioner to retreat and move quickly from the place where he was standing while inspecting the passing train for "hot boxes" and thus to use as a place of work a part of the respondent's right-of-way covered with loose and sloping gravel which did not provide adequate and sufficient footing for the petitioner to move in a reasonably safe manner.

(3) Whether, the petitioner, under the circumstances aforesaid, was entitled to have his case submitted to a jury under evidence showing that the respondent's method of work was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did in fact operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent did not provide the petitioner with a path or other means adequate for escape from the fire; (f) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes."

(4) Whether, the petitioner was entitled to have submitted to the jury the nature of the task which the petitioner was performing, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, walk or run in order to escape the perils of the fire set upon him by the movement of the respondent's train so that the jury could consider all these facts and circumstances in determining whether the respondent was negligent.

(5) Whether, the state court has narrowed the concept of "proximate cause" under the Federal Employers' Liability Act and has usurped the function of the jury in holding as a matter of law that the petitioner's injury was not proximately caused by negligence of the respondent.

STATUTES INVOLVED.

The statutes involved are:

28 U. S. Code, Sec. 1257 (Appendix F).

45 U. S. Code, Sec. 51 (Appendix G).

45 U. S. Code, Sec. 53 (Appendix H).

45 U. S. Code, Sec. 54 (Appendix I).

45 U. S. Code, Sec. 56 (Appendix J).

STATEMENT OF MATERIAL FACTS.

Under the pleadings (R. 2, 5) it was admitted that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that by reason thereof the petitioner and the respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U. S. Code, secs. 51-60.

The petitioner, 27 years old at the time of trial, married, father of one child (R. 8, 9), brought this suit against Guy A. Thompson, who was operating as trustee, the Missouri Pacific Railroad Company, to recover damages for injuries sustained at Garner, Arkansas, through the negligence of the railroad, in failing to use ordinary care to furnish the petitioner a reasonably safe place in which to work or a reasonably safe method of doing said work. The petitioner at the time of injury was assigned to the task of burning weeds by the use of a hand torch. He had no warning or preparation as to how to safeguard himself from the perils of fire fanned up by a passing train operated by the respondent. The injury occurred on July 27, 1951, about 10:30 A. M. (R. 12).

The petitioner had two duties to perform at one and the same time: (1) to inspect passing trains for "hot boxes" and (2) to attend the fire then set on the shoulder. The performance of both of these duties required petitioner to be upon the west shoulder of the respondent's right-of-way (R. 20-21).

To the south, west and north of the petitioner were weeds (R. 28) prepared for rapid ignition by chemical spray previously applied by the respondent (R. 58, 60, 86, 194). These dead weeds were thicker and taller toward the north, the direction toward which he was working (R. 194), and the culvert was located only 30 or 35 yards north of the petitioner (R. 18). The west shoulder, on which petitioner performed his duties, was flat and three or four feet wide (R. 13), offering exit from the flames only as far north as the culvert from which he fell (R. 24, 25, 185, 186). At the culvert, such exit ended, and there was no flat surface or walkway on the culvert (R. 24, 25, 185, 186).

This was the first time the petitioner had ever attempted to do said work and he had never watched anyone attempt to do it theretofore (R. 15). He had been given this hand torch only 30 to 45 minutes before the injury occurred (R. 16).

On this occasion the petitioner "was not notified by anyone" of the approach of the northbound train involved herein (R. 26, 62). Ordinarily, the section foreman would notify his crew to clear the tracks prior to the approach of a train (R. 26). That was the foreman's job and the section crew would continue working until he called "train" (R. 26, 62).

He was told by the foreman not to cross to the east because " the sound of one train would deaden the sound of another one that possibly would come from the other way" (R. 21). He was further told to "always stand on the

shoulder" (R. 21). The only other instructions given to petitioner were to the effect that whenever a train was passing "to drop everything" he was doing and watch for "hot boxes" (R. 20, 88, 89, 90). Standing on the west shoulder, as above directed, would place the petitioner in close proximity to the tracks whereon respondent's train was moving (R. 19).

When petitioner heard the whistle of the northbound train (the only notice he had) he immediately ran a distance of 30 to 35 yards to the north before he set down his torch; this was the amount of space intervening between him and the culvert that was north of him (R. 18, 22). While running to the north, the petitioner necessarily had his back to the fire which was south of him. He ran this distance in order to get far enough away from the fire to clear himself (R. 23) and when he reached this point he thought he was "plenty far enough" to clear himself of the fire "or any danger of the fire and it was time to start to watch these journals" (R. 23). He took his position on the west shoulder where he was told to stand (R. 21).

At this instant, the northbound engine had already passed him (R. 22, 23). He began watching the passing train for "hot boxes" under instructions theretofore given to him by his foreman. While thus watching said "hot boxes" (a period of 2 or 3 seconds) approximately three or four cars went by at a rate of 35 to 40 miles per hour (R. 180-181). He was then overtaken by "fire right up in" his face (R. 23). This caused him to retreat quickly (R. 23, 28, 63). He threw his left arm over his face, backing away rapidly, six or eight feet onto the culvert immediately north of him, at which time he fell because of the inadequacy of the footing there provided to him (R. 23, 24, 28, 67, 98, 114, 193).

When he stepped upon the crushed rock along the western part of the culvert, the crushed rock rolled out from

his feet, causing him to fall and to be injured (R. 25, 68, 69, 90, 91). He did not and could not look to see where he was going (R. 23, 68). At this point he had fire and smoke in his eyes and could not see (R. 23, 68).

In thus moving to the north, he moved to the only direction that was open to him. He could not move to the south, because that direction was blocked by the fire (R. 86). He could not move to the west because doing such would have placed him in weeds which were chemically prepared for burning and they were immediately adjacent to the fire (R. 58, 60, 86, 194). He could not move to the east, because he had been specifically instructed by the foreman not to stand on, or close to the adjacent track if a moving train was on the other track (R. 21). He was told to "always stand on the shoulder" (R. 21).

The petitioner, who had no previous experience, did not know that the passing train would cause sufficient wind to fan or blow the fire (R. 23, 87). He knew the train would cause wind (R. 87), but thought the wind would not affect the fire too much because there was another track (the southbound track) between the train and the petitioner (R. 87, 19).

The foreman was aware that the weeds which he ordered the petitioner to burn were dead, having been killed by a prior chemical spray (R. 287). The foreman had a great deal of experience in doing this kind of work and had for over twenty years used a flame-thrower machine to fire the shoulders (R. 15, 84, 85, 304). This machine permits the employees to remain in a place of safety as they are stationed on a part of the machine approximately 15 or 20 yards away from the fire (R. 16). The petitioner testified that was the normal method of doing said work (R. 16). The foreman, however, testified that the flame-thrower had been discarded some years before the date of accident be-

cause it caused too much damage along the right-of-way (R. 209, 300).

The petitioner testified he knew it was his primary duty to watch the fire (R. 90), and that he was never told "to completely ignore a fire you set" (R. 89); but the positive order to watch for "hot boxes" remained in effect and he was given no warning or instructions as to the manner of performing these two tasks simultaneously. Neither the foreman nor any other witness testified or even intimated that the petitioner's attempt to perform these two tasks was improper or different from what was expected of him.

The petitioner alleged (R. 3) "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

The respondent in his Answer (R. 5, 6, 7) denied his own negligence and alleged that the petitioner's injuries were directly caused by the petitioner's own ngligence and carelessness in four respects: (a) in failing to keep a lookout ahead and laterally in the direction in which he was walking (R. 6); (b) in failing to maintain secure footing in the circumstances under which he was working and performing his duties (R. 6); (c) in walking backwards or sidewards without looking in the direction in which he was walking and without ascertaining for himself the security of his own footing (R. 6); (d) in making a mis-step at a time when the petitioner was familiar with the conditions under which he was required to work and the structure of the ground upon which he was working and in thus failing to protect himself from slipping and falling (R. 6, 7).

The respondent did not allege or claim in his Answer that the petitioner was negligent in failing to "attend or watch" the fire.

The trial court submitted the case to the jury under written instructions and the jury returned a unanimous verdict in favor of the petitioner and assessed his damages in the sum of Forty Thousand Dollars ($40,000.00) (R. 426). Before it could return a verdict, the jury was required to find that the respondent was negligent in failing to use ordinary care to provide the petitioner with a reasonably safe place in which to work and a reasonably safe method of doing said work under the circumstances aforesaid (R. 419, 420, 421).

At the request of the respondent, the issue of the petitioner's alleged negligence in failing to guard properly his footsteps was submitted to the jury (R. 421-422). The respondent did not request the trial court to give any instructions authorizing the jury to find that the petitioner was guilty of negligence in leaving the fire "unattended and unwatched" or in creating any emergency, and no such instruction was given by the trial court of its own motion (R. 419 through 426).

The trial court accepted the verdict of the jury and entered judgment thereon. Thereafter, the respondent's motion for a new trial was overruled (R. 431). The respondent appealed to the Supreme Court of Missouri, which court reversed the judgment (R. 437-438) holding that the petitioner had failed to make a submissible case.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

(1) The State Court by Its Decision and Judgment in This Cause, Denied Petitioner a Right Specially Set Up and Claimed by Him Under the Federal Employers' Liability Act, Namely, the Right to Have His Case Submitted to a Jury on the Theory That the Petitioner, While Admittedly Employed by Respondent in Interstate Commerce, Was Injured as a Result of the Negligence of the Respondent in Failing to Use Ordinary Care to Furnish the Petitioner a Reasonably Safe Place in Which to Work and a Reasonably Safe Method With Which to Perform Said Work.

The judgment of the state court, if permitted to stand, will deprive this petitioner of the right of a trial by jury, a basic feature of our system of federal jurisprudence. State courts generally will be encouraged to disregard the clear and repeated pronouncements of this Court to the effect that the trial court must submit the issues of negligence to a jury whenever the facts establishing negligence are in dispute or the evidence is such that fair-minded men may draw different inferences therefrom. Under such circumstances the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. This court granted certiorari to the Supreme Court of Missouri in the Lavender case cited below wherein the rules announced above were authoritatively stated by Mr. Justice Murphy speaking in behalf of this court.

Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;
Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;
Wilkerson v. McCarthy et al. (1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

A. **The state court usurped the function of the jury.**

It was the function of the jury to determine whether or not the respondent was negligent in requiring this inexperienced employee to perform conflicting duties at one and the same time, in adopting an unsafe method to do the particular work, in furnishing inadequate footing in which to perform this task. It was the province of the jury to weigh the hazards and effort which the work entailed, and to appraise the kind of footing and the space provided by respondent in which the petitioner could stand or move in order to escape the perils of the smoke and flames blown toward him by respondent's train.

II.

The State Court Based Its Opinion Upon a Theory Not Presented by the Respondent in Its Answer (R. 6, 7) **and Upon a Theory That Was Not Submitted to the Jury** (R. 419 to 427).

The state court pivoted its opinion upon the assertion that petitioner was injured through an emergency brought about by himself in leaving the fire "unattended and unwatched" (R. 448) (Appendix A, page 35). This conclusion was not warranted by the evidence and the state court refused to modify its opinion (R. 450 to 453) (Appendix C) to show the record facts (R. 180-181) to the effect that the petitioner necessarily while running north 30 to 35 yards in an effort to get far enough away to clear himself of the

fire. (R. 23) had to have and did have his back to the fire; that he then stood on the west shoulder where he was told to stand (R. 21) for only 2 or 3 seconds before he was overtaken by the flames; that during this few seconds' interval he was following the instructions of the respondent theretofore given him "to drop everything" and watch for "hot boxes" on the passing trains (R. 20, 88, 89, 90).

III.

The State Court Usurped the Function of the Jury in Deciding as a Matter of Law That Petitioner's Injuries Were Not Related to the Negligence of the Respondent and It Narrowed the Concept of "Proximate Cause" Under the Federal Employers' Liability Act.

Under the Federal Employers' Liability Act the concept of proximate cause is enlarged by the wording of the statute and makes the employer liable for his negligence even though some other factor may logically be said to be more influential in producing the injury. See Eglsaer v. Scandrett et al., 151 F. 2d 562, l. c. 565, wherein this thought is epitomized in a quotation from Mr. Justice Holmes: "We must look at the situation as a practical unit, rather than inquire into a purely logical priority."

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

It is elemental that the respondent owed the petitioner the duty to use ordinary care to furnish the petitioner (1) a reasonably safe place to work and (2) a reasonably safe method of work. This duty was a continuing duty and the respondent was not relieved of its obligations because

the petitioner's work at the place and by the method in question was fleeting or infrequent. Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The mere fact that the petitioner was performing a task which was not of daily routine did not lessen the dangers attached thereto nor change the above standards of law. The continuing duty of the respondent followed the petitioner wherever he might go in the course of performing the work assigned to him by the respondent.

The state court in its opinion (R. 443), Appendix A, page 30, states the contentions of respondent as follows:

> "As stated, defendant-appellant contends the trial court erred in overruling defendant's motion for a directed verdict. It is said there was no proof that an accident and injury could have been reasonably foreseen from the manner in which the drainage culvert was constructed and maintained; and there was no evidence that plaintiff's alleged injury was proximately caused by the method adopted by defendant in burning the weeds or that such an injury or danger could have been reasonably foreseen in the method used by defendant."

In the light of the record facts these contentions are untenable. The record is clear that the respondent prior to the petitioner's injury did nothing to foresee or anticipate the likelihood of petitioner's injury, although the respondent was under a duty to do so. Had the respondent given any thought to the matter

> 1) He would not have ordered the inexperienced petitioner to stand and work upon the west shoulder in close proximity to the tracks upon which a train was then and there being operated while the weeds were burning nearby.

2) He would not have sent a train at such speed that it would cause the fire to fan and spread rapidly.

The combination of the above two conditions cannot be reconciled with care.

3) If, however, he negligently insisted upon the above conditions, then he should have warned the petitioner of the dangers involved and he should have provided adequate means of escape therefrom.

No crystal ball was needed. Given the facts in this record, an injury was almost inevitable.

Paraphrasing the words of Mr. Justice Douglas in the Bailey case, supra,

> "these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing *the petitioner* with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury." (Words in italics paraphrased.)

A) The state court usurped the function of the jury when it decided as a matter of law that the "evidence is completely lacking in probative facts supporting a conclusion that defendant's negligence, in whole or in part, contributed to plaintiff's injury" (R. 448). Appendix A, page 35.

The applicable rule of law is authoritatively stated by Mr. Justice Murphy in Lavender v. Kurn (1946), 327 U. S. 645, l. c. 653, 66 S. Ct. 740, 90 L. Ed. 916, l. c. 923:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is re-

quired on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This Court expounded the same principles in Wilkerson v. McCarthy et al. (1949), 336 U. S. 53, l. c. 55 and 57; 69 S. Ct. 413, 93 L. Ed. 497, l. c. 501, wherein Mr. Justice Black said:

"This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. * * * It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case."

The opinion continued (l. c. 502):

"It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

II.

The errors into which the state court fell are manifest.

A) After searching the record, it brought forth a theory of its own which was not presented by the respondent in the pleadings nor was it submitted by the respondent to the jury at the time of trial. Nowhere in the respondent's Answer (R. 6, 7) did the respondent allege that the petitioner was guilty of negligence in ignoring the fire or leaving it "unattended or unwatched" and the respondent did not request the trial court to give an instruction submitting any such issue (R. 419-427). The state court, however, in its opinion, stated: "It is true plaintiff was confronted by an emergency, in a sense; but as we shall see, it was an emergency brought about by himself" (R. 447) Appendix A, pages 34-35. This conclusion is not warranted by the evidence and it is certainly not in accordance with the statement of Mr. Justice Black in the Wilkerson case, supra, to the effect that "We need look only to the evidence and reasonable inferences which tend to support the case of a litigant."

In the first place, the petitioner did not create the emergency. It was definitely created by the respondent who required the petitioner to be upon the west shoulder of its right-of-way (R. 21) watching trains for "hot boxes" which duty the petitioner was not free to ignore since it was imposed upon him by the respondent. He could not move to the south and into the fire, nor to the west, which the fire would embrace (R. 58, 60). He was prohibited by positive instructions from crossing over the tracks to the east because of the dangers incident to such crossing (R. 21). This was the first time the petitioner had ever attempted to perform this duty (R. 15) and he had never seen anyone else attempt to perform it (R. 15). He did not know that the passing train would cause sufficient wind to fan or blow the fire (R. 86, 87). He thought he was

a safe distance away from the fire when he was overtaken by it while watching for "hot boxes" on the passing train (R. 20, 88, 89, 90).

The interval, used by the petitioner, covered only a matter of two or three seconds, as the uncontradicted evidence showed that only three or four cars of the train (R. 180-181) passed during the short period while the petitioner, pursuant to positive orders, was watching for "hot boxes." Since the train was moving at the rate of 35 to 40 miles per hour (R. 180-181) it was traveling at the rate of 49 to 56 feet per second. Therefore, it would travel three or four car lengths (120-160 feet) in two or three seconds. All the evidence showed that only three of four cars passed him (R. 180-181) while he was directing his attention to the "hot boxes." It was only during that short interval of two or three seconds that the petitioner left the fire "unattended and unwatched."

These are the undisputed facts which are determinative of whether or not the petitioner created the emergency in leaving the fire "unattended and unwatched." These same facts, ignored by the state court in its opinion, are decisive of the issue that it was the respondent who actually created the emergency by compelling the petitioner to watch the "hot boxes" at a time when it was highly dangerous for him to do do. It was the imposition of these concurrent and conflicting duties that helped to make the respondent's method of doing the work an unsafe and dangerous one. These conflicting duties were imposed upon the petitioner by the respondent at the very time when the respondent caused its train to move at such rate of speed that it did fan the fire toward the petitioner, whose place of work on the west shoulder was selected by the respondent (R. 21).

Conceding that the petitioner understood that his "primary" duty was to attend the fire and that he was not

told to ignore the fire completely (R. 88), it does not follow that said duty was exclusive nor that he could ignore his concurrent duty, that of watching for "hot boxes."

The various labels on duties, whether they be called "first," "primary," "positive" or anything else, must be considered and evaluated in the light of all of the circumstances present. Of necessity, for a two or three second interval, the petitioner was required to give attention to one duty rather than to the other. To illustrate: A locomotive fireman is under the duty to watch his boiler and the amount of steam that is coming up and at the same time is under the duty to keep a lookout while approaching public crossings. It could well be said that the duty of watching the boiler and the steam is his "primary" or "first" duty. On the other hand, we know that the safety of the train and its passengers, as well as the safety of the public depends upon the performance of his "positive" duty to keep a vigilant watch while approaching public crossings. Can it be said that while the fireman is looking out of the window for two or three seconds in the performance of his "positive" duty, he is guilty of negligence in not performing the "primary" duty of watching the steam during that very same interval of time? The answer is "No," because of the very nature of the duties. A jury must appraise an employee's conduct in the light of all the circumstances in evidence. It must be remembered, too, that the petitioner who was not even charged with negligence in leaving the fire "unattended and unwatched" cannot have his recovery defeated by contributory negligence.

B) It will be further noted that the state court disposed of vital issues, to-wit: Whether the respondent exercised ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method of work simply by holding that the hand torch (in itself)

was safe and did not make the fire dangerous. The language employed by the state court is as follows: "Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds. * * * And the use of the hand torch in firing the weeds did not make the fire dangerous" (R. 447-448), Appendix A, page 35.

Such a simplification of the issues was unjustified. The petitioner does not contend that the hand torch alone endangered his safety. The state court ignores all of the other facts and circumstances in evidence. The petitioner, an inexperienced employee, was told to stand on the west shoulder (R. 21). He was instructed to watch the passing train for "hot boxes." This necessarily brought him into close and dangerous proximity to the passing train. He did not know the dangers that attached to this work and had received no warnings or any other preparation for it. While thus following instructions, he was imperiled by the fire and flames which were blown toward him by the passing train controlled by the respondent. His peril was caused by three things: (1) respondent's demand that the inexperienced petitioner stand and work upon the west shoulder in close proximity to the tracks upon which a train was then and there being operated while the weeds were burning nearby; (2) respondent's sending a train, under the circumstances aforesaid, at such rate of speed that it did cause the fire to fan and spread rapidly; and (3) the failure of the respondent to provide any reasonably safe means of escape.

These are the record facts and it is no answer to respondent's negligence under the circumstances here shown to simply say that the hand torch (in itself) was not dangerous and we think it is illogical to contend that these hazards can be considered as isolated and detached elements. They were all related to each other and respondent cannot be absolved merely because said hand torch

(in itself) was not unsafe or because the path over the culvert might be reasonably safe for other section men, at other times, performing other duties.

III.

A) The state court usurped the function of the jury in deciding as a matter of law that the petitioner's injuries were not related to negligence on the part of respondent. In the words of Mr. Justice Black, in the Wilkerson case, supra,

> "its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony" (93 L. Ed. 501).

In light of the facts, hereinbefore presented, it is difficult to understand how the state court reached the conclusion that the petitioner's movements in escaping from the fire were "extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert" (R. 448, Appendix A, page 35). Just plain common sense tells us that one who is exposed to the perils of fire in the performance of any duty should be provided with a reasonably safe avenue of escape. Certainly any prudent person would reasonably anticipate that when a train causes the fire to blow on an employee who is required to stand in close and dangerous proximity to said train that he might have to retreat quickly therefrom or else be consumed thereby. The shoulder and pathway were the same to the petitioner as the fire escape on a hotel building is to anyone lodged therein. It would be absurd to say that the hotel owner does not have to use ordinary care to maintain a fire escape in reasonably safe condition simply because said owner does not know when, where or how a fire will start.

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to

take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. * * * It is the jury, not the court, which is the fact-finding body. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, l. c. 35, 64 S. Ct. 409, 88 L. Ed. 520, l. c. 525.

B) The state court narrowed the concept of "proximate cause" under the Federal Employers' Liability Act.

"The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice

Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.'" The above quotation is from Roberts, "Federal Liabilities of Carriers", Sec. 869, as found in Eglsaer v. Scandrett et al., 151 F. 2d 562, l. c. 565, 566, in which that court further states:

The statute "provides that if the railroad's negligence '*in part*' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation'—if the injury or death resulted '*in part*' from defendant's negligence, there is liability."

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident."

We believe that the state court's conclusion of law and fact that respondent's negligence was not the cause of the petitioner's injuries was invalid under the evidence and under any definition of "proximate cause." Certainly, a jury of fair-minded men should be permitted to find under the statute that respondent was negligent and that said negligence contributed "in part" to cause the petitioner's injuries.

PRAYER.

For the reasons herein given, petitioner prays for a Writ of Certiorari directed to the Supreme Court of Missouri to the end that the judgment of that court may be reviewed by this Court and reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

MARK D. EAGLETON,
THOMAS F. EAGLETON,
3746 Grandel Square,
St. Louis 8, Missouri,
Attorneys for Petitioner.

INDEX TO APPENDIX.

APPENDIX A.

Opinion of the Supreme Court of Missouri, November 14th, 1955.

(R. 439 to 449.)

In the
Supreme Court of Missouri,
Division Number One,
September Session, 1955.

James C. Rogers, Plaintiff-Respondent, v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant.	No. 44,595.

Appeal From the Circuit Court of the City of St. Louis,
Honorable F. E. Williams, Judge.

Plaintiff, James C. Rogers, instituted this action under the Federal Employers' Liability Act (45 U. S. C. A., § 51 et seq.) for personal injury alleged to have been sustained by him July 17, 1951, when, during the course of his employment, he was burning weeds on defendant's right of way near Garner, Arkansas, and fell at one of defendant's drainage culverts. Plaintiff had verdict and judgment for $40,000 damages, and defendant has appealed.

Plaintiff alleged that he, as defendant's employee, was engaged in burning weeds by the use of a hand torch at a point a short distance north of Garner Crossing; that in so doing he was required to work at a place in close prox-

imity to defendant's tracks whereon trains were passing; and that a train caused the fire from the burning weeds to come so dangerously close to him that he was obliged to retreat and move quickly from the place where he was working and to use as a place of work a part of defendant's right of way that was covered with loose and sloping gravel which did not provide adequate and sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff further alleged "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

Inasmuch as defendant-appellant's initial contention is that plaintiff failed to make out a case submissible to a jury and the trial court erred in overruling defendant's motion for a directed verdict, we will examine the evidence tending to support plaintiff's claim.

Plaintiff, twenty-four years old when injured, fell and was injured at a culvert approximately two hundred fifty yards north of Garner Crossing, a public crossing over defendant's line. At this point defendant's double-track line lies in a north-south direction. The tracks, consisting of rails and ties resting on gravel or crushed rock ballast, are supported by an earthen "dump."

Plaintiff had become the employee of defendant as a section laborer May 21, 1951; and in the morning of July 17, 1951, he with others of the section crew in charge of one Howdershell as foreman had started working near McRae, a short distance south of Garner Crossing. The section men worked until ten-thirty between McRae and Garner

Crossing, at which time the foreman directed others of the crew to do some work three or four hundred yards north of the crossing. However, plaintiff was given the task of burning weeds and other vegetation on the shoulder, and on an area two and a half or three feet wide down over the crest of the incline of the dump. Plaintiff was told to begin just north of the crossing and burn the vegetation up to a point several hundered yards north of the crossing. The vegetation was dry. It had been withered and killed by chemicals. Plaintiff was given a torch consisting of a quart container with a spout on one side and a three-foot handle on the other. The spout was stuffed with waste for a wick, and the container was filled with kerosene and "white gasoline mix." Plaintiff had not theretofore seen anyone attempt to fire vegetation with that sort of device. He said that normally it is done with a flame thrower wherein the operators sit fifteen or twenty yards ahead of the flame. Flame throwers burn the whole right of way. Plaintiff had seen a flame thrower used. This was long before he was employed by defendant. Plaintiff does not know what the section crew's duty was when the flame thrower was used. (Defendant's foreman testified a machine had been used as a flame thrower in burning weeds from 1928 or 1929 to early 1950. The machine caused too much fire. It burned hay, pasture and woodland on properties adjoining the right of way. The section men had to follow along and fight fire. The machine was later converted into a sprayer to kill weeds and after they are killed, the section men burn them. They use a torch or "something that is handy." They now have less fire and fire fighting.)

Pursuant to instructions, plaintiff had fired the weeds, "just spots," along the west shoulder and west side of the incline up to a point thirty or thirty-five yards south of the drainage culvert when a train came from the south on the east (northbound) track.

In firing the weeds, plaintiff had been walking two and a half or three feet from the west ends of the ties supporting the rails of the west (southbound) track. There is a flat place, "a path," along there—a shoulder three to three and a half feet wide—between the edge of the sloping ballast and the crest of the dump.

Having heard the train whistle for the crossing and having seen that the train was on the east track, plaintiff quit firing the weeds, set the torch on a tie west of the west rail of the west track and ran northwardly to a point "right next" to the culvert. He knew the culvert was there. He had noticed it when he "was running north." But he paid no attention to it. He had forgotten it at the time. And, ignoring the fire, plaintiff directed his attention to the passing train. Plaintiff knew there would be a "wind come along behind" a passing train; but, there being a track between the fire and the train, he "didn't think the wind would affect it too much." Plaintiff explained how he was injured as follows: "At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or any danger of the fire and it was time to start to watch these journals. So, I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell."

Plaintiff further testified his foreman had instructed that when trains approached the sectionmen were to "get clear of what we were doing and stand and watch the trains go by for hot boxes. . . . He (the foreman) said

at all times he wanted some of (the) men on one side of the track and some on the other." The foreman had also said, "'Don't stand even on the end of the ties or close to the other rail while there is a train on the opposite rail, because the interference, the sound of one train would deaden the sound of another one that possibly would come from the other way.'" The foreman had said to "'always stand on the shoulder.'" Plaintiff testified there was no flat surface or walkway over the top of the culvert where he was injured. A flat pathway on the shoulder including the ends of culverts was "supposed to be" kept free of ballast, so "the men would have a safe place to walk." He said that "normally" there is a flat place two or two and one-half feet on which to wa across a culvert; on this one there was nothing but crushed rock—no flat surface. "It (the ballast) rolled ou from under me." Vibration of trains had shaken crushed rock down onto the culvert so as to make a sloping incline.

Plaintiff, on cross-examination, testified that, when the foreman told him and others of the section crew to suspend their labors when a train approached and watch for hot journal boxes, he did not understand that he, plaintiff, when burning weeds, was to completely ignore the fire. Plaintiff "never thought he (the foreman) meant anything like that." Plaintiff said he knew it was his primary duty to watch the fire.

Plaintiff, on cross-examination, further testified as follows, "Q. When you slipped, you say the gravel slipped out from underneath you? A. Yes. Q. This is that portion of the gravel that is right up next to the ties, isn't it? A. Yes, sir. Q. There is gravel right up next to those ties everywhere along the railroad, isn't there? A. Yes, sir. Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it? A. Yes. . . . Q. You say the section gang keeps a path there for themselves to

walk on? A. It is there, yes, sir. Q. On both sides of the right-of-way? A. Yes, that's right. Q. Every place on the railroad you have been? A. No, sir, not every place. Q. Well, all along the right-of-way on that section you worked on? A. Yes, there is a flat surface of dirt other than where the culverts are. Q. Other than where the culverts are? A. Yes. Q. So anytime you come to a culvert there isn't any. Is that right? A. There is not a dirt, flat surface. Q. At any culvert? A. To a certain extent; I mean not like a shoulder is."

Defendant's foreman testified that, "generally speaking," there is a shoulder eighteen inches to three or four feet wide along the outer edge of the ballast. There is no ballast on the shoulder unless "there would be loose rock kicked out. . . . We clean it up if we have a slide." The section men keep the ballast "lined up (approximately) straight."

As stated, defendant-appellant contends the trial court erred in overruling defendant's motion for a directed verdict. It is said there was no proof that an accident and injury could have been reasonably foreseen from the manner in which the drainage culvert was constructed and maintained; and there was no evidence that plaintiff's alleged injury was proximately caused by the method adopted by the defendant in burning the weeds or that such an injury or other danger could have been reasonably foreseen in the method used by defendant.

As to the issue of negligence—the facts in the instant case are not like those in Bailey v. Central Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062, cited by plaintiff-respondent, wherein the employee was ordered to work at a particular place where there was a narrow footing and no guardrail on a bridge eighteen feet above the ground, and the wrench he was required to use, unless disengaged when the doors of a hopper car were opening, was likely to spin

with the shaft of the hopper and throw the employee off balance. Defendant was not absolved from its continuing duty to provide the employee with a reasonably safe place to work by the fact that the work there required was fleeting or infrequent. The nature of the task which the employee undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether the employer, in furnishing the employee with that particular place in which to perform the task was negligent. Nor are the facts of the instant case like those in Kelso v. W. A. Ross Const. Co., 337 Mo. 202, 85 S. W. 2d 527, wherein the employee was required to work alternately between the top of a rock pile where he was safe, and on the ground by the rock pile in the performance of duties which distracted his attention from the danger of trucks passing or backing through or into his place of work, and no warning was given or other precaution taken to protect him from the danger. In Tatum v. Gulf, M. & O. R. Co., 359 Mo. 709, 223 S. W. 2d 418, cited by plaintiff-respondent, there was no catwalk, platform or guardrail on a trestle so as to guard trainmen against the danger of falling to a creek thirty-four feet below. In Luthy v. Terminal R. Ass'n of St. Louis, Mo. Sup., 243 S. W. 2d 332, there was no light at plaintiff's place of work, and plaintiff working in the dark fell over a black switch mechanism when attempting to board a car.

As to the issue of causal connection—the mere fact that injury follows negligence does not necessarily create liability—causal connection between negligence and injury is necessary. The test of whether there is causal connection is that, absent the negligent act the injury would not

have occurred. Moreover, in order that negligence be actionable, there must not only be causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury. Foreseeability of injury is sometimes employed as a test of proximate cause; but if it reasonably could have been foreseen or anticipated that an act of commission or omission was likely to injure someone, then it makes no difference that the manner in which the act did injure someone might not have been foreseen or anticipated and the actor may be held liable for any injury which, after the occurrence, appears to have been a natural and probable consequence of his act. Kimberling v. Wabash R. Co., 337 Mo. 702, 85 S. W. 2d 736; Annin v. Jackson, 340 Mo. 337, 100 S. W. 2d 872; Pedigo v. Roseberry, 340 Mo. 724, 102 S. W. 2d 600; Mrazek v. Terminal R. Ass'n of St. Louis, 341 Mo. 1054, 111 S. W. 2d 26; Gray v. Kurn, 345 Mo. 1027, 137 S. W. 2d 558; Rose v. Thompson, 346 Mo. 395, 141 S. W. 2d 824; Fassi v. Schuler, 349 Mo. 160, 159 S. W. 2d 774; Springer v. Security Nat. Bank Savings & Trust Co., Mo. Sup., 175 S. W. 2d 797; Branstetter v. Gerdeman, Mo. Sup., 274 S. W. 2d 240.

The principle of the essentiality of proximate causation has been recognized by the Supreme Court of the United States in Federal Employers' Liability Act cases. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; Brady v. Southern R. Co., 320 U. S. 476, 64 S. Ct. 232; Reynolds v. Atlantic Coast Line R. Co., 336 U. S. 207, 69 S. Ct. 507. As pointed out in Luthy v. Terminal R. Ass'n of St. Louis, supra, Mo. Sup., 243 S. W. 2d 332, the Brady case (a five to four holding) involved facts arising prior to the 1939 amendment to the Federal Employers' Liability Act. However, the 1939 amendment did not affect the rule that liability must be based on negligence—a proximate cause of the injury. In Tiller v. Atlantic Coast Line R. Co., supra, the court held that the Act and its amendment

of 1939 abolished the post—**Priestly v. Fowler** defenses (the fellow servant—assumption of risk rule) and authorized comparison of negligence instead of barring the employee from all recovery because of contributory negligence. But the Act and the amendment "leave for practical purposes only the question whether the carrier was negligent **and whether that negligence was the proximate cause of the injury.**" (Our emphasis.)

In the Brady case, plaintiff's decedent, assisting in a switching movement, was thrown from the step of a gondola car to instant death when the trucks of the car hit "the wrong end" of a closed derailer on the east rail of the switch track. The opposite (west) rail of the switch track was defective. The west rail was so worn on the top and sides that experts were of the opinion it permitted the thrust of the east wheels of the trucks, as they rose over "the wrong end" of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, " 'nine times out of ten, if the best type' " rail was in use. The misuse of the derailer was an act of negligence, but it was mere speculation as to whether that negligence was chargeable to decedent or another. Plaintiff, therefore, could not recover on the theory that defendant was negligent in setting the derailer without warning decedent. As to negligence in using a defective rail—the rail was sufficient for ordinary use, and defendant was not obliged to foresee or guard against misuse of the derailer, although a witness with years of experience as a brakeman recalled instances when trains were improperly backed over a closed derailer. The Supreme Court of the United States was of the opinion that the misuse of the derailer was entirely disconnected from the earlier act of defendant in placing the weak rail in the track. The unsound rail was not a proximate cause of the accident. The mere fact that with a sound rail the accident would not have happened was not enough.

In our case, plaintiff's testimony leaves much unsaid as to the actual condition at the west end of defendant's drainage culvert, and as to the place where defendant was stepping when he fell. Plaintiff's testimony at best tends to show the fact that generally there was a level shoulder between the edge of the ballast and the crest of the dump supporting defendant's tracks. This level shoulder was supposed to be kept there so that section men might have a safe place to walk when working. There were flat surfaces across the ends of culverts, but not "like" the shoulders were. Considered from a standpoint most favorable to plaintiff, it reasonably could be said the flat surface across the west end of the culvert in question was narrower than elsewhere along the shoulder, and the vibration of trains had loosened and shaken down some gravel or crushed rock so as to make an inclined surface down to or near the end of the culvert. Plaintiff's testimony, which we have quoted in question and answer form, supra, was support for a conclusion that plaintiff slipped on gravel "right up next to the ties"; however, at another time while testifying, plaintiff said, "I didn't back up east, next to the rails." Even so, the condition of the culvert was not shown to have been unsafe for workmen in the ordinary use of the area in maintaining the tracks, including the firing and attending the firing of "spots" of weeds along the shoulder and incline of the dump. Can it be correctly said that a reasonably careful and prudent person would assume that loose gravel or crushed rock, shifted down on the shoulder at the culvert by the vibration of trains, would subject section men to an unreasonable hazard, accustomed as section men are to moving over tracks, ties and ballast in their multiple duties in the maintenance of the line? It is established that the standard of care must be commensurate to the dangers of the business. Less diligence is required where the danger is slight than where great. Frizzell v. Wabash R. Co., 8 Cir., 199 F. 2d 153. It

is true plaintiff was confronted by an emergency, in a sense; but, as we shall see, it was an emergency brought about by himself.

Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds. See and compare Fore v. Southern Ry. Co., 4 Cir., 178 F. 2d 349. Of course, it could be asserted that fire itself is a hazard. But it is not contended that defendant was negligent in starting a fire. And the use of the hand torch in firing the weeds did not make the fire dangerous. Defendant did not start a fire on its right of way and abandon it to sweep at large in changing winds or in swirls of wind caused by passing trains. Defendant had detailed plaintiff to fire the weeds; and, according to his testimony, plaintiff knew it was his primary duty to watch the fire.

It seems to us that the fire—unattended and unwatched as it was—swept northwardly by the wind of the passing train toward defendant's culvert so that plaintiff (who had left the fire unattended) was obliged to move blindly away and fall, was something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert. And now, after the event, we are obliged to say we think plaintiff's injury was not the natural and probable consequence of any negligence of defendant. And if there was negligence in failing to maintain a sufficiently wide path across the culvert or in permitting that path to become covered with crushed rock or gravel, still plaintiff's evidence is completely lacking in probative facts supporting a conclusion that defendant's negligence, in whole or in part, contributed to plaintiff's injury. Brady v. Southern R. Co., supra, 320 U. S. 476, 64 S. Ct. 232; Atlantic Coast Line R. Co. v. Anderson, 5 Cir., 221 F. 2d 548; Chesapeake & O. Ry. Co. v. Burton, 4 Cir., 217 F. 2d 471; Gill v. Pennsylvania R. Co., 3 Cir., 201 F. 2d 718; Fore v. Southern Ry.

Co., supra, 178 F. 2d 349; Wolfe v. Henwood, 8 Cir., 162 F. 2d 998; Seaboard Air Line R. Co. v. Gentry, Fla., 46 So. 2d 485; Restatement, Torts, § 433.

The judgment should be reversed.

It is so ordered.

Paul Van Osdol,
Commissioner.

Coil, C., concurs.

Holman, C., concurs.

Per Curiam: The foregoing opinion by Van Osdol, C., is adopted as the opinion of the court. All of the judges concur.

APPENDIX B.

Judgment.

Entered November 14th, 1955 (R. 437-438).

James C. Rogers, Respondent,

vs. Appeal from the Circuit Court of the City of St. Louis,

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor.

APPENDIX C.

Filed November 28th, 1955.

(R. 449 to 453.)

In the
Supreme Court of Missouri,
Division No. 1.

September Session, 1955.

James C. Rogers,
Plaintiff-Respondent,

vs.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation,
Defendant-Appellant.

No. 44,595.

Appeal from the Circuit Court of the City of St. Louis,
Honorable F. E. Williams, Judge.

Respondent's Motion to Modify the Opinion.

A.

Comes now James C. Rogers, Respondent, and moves the Court to modify its Opinion filed herein on the 14th day of November, 1955. At page 4 of its Opinion, the Court quotes a part of plaintiff's testimony dealing with plaintiff's conduct in watching the passing train as follows:

"After the train had gotten approximaely half or two-thirds of the way back, I felt this heat on my face, on the side of my face." At no place in the Opinion does it refer to plaintiff's further testimony that only 2 to 3 sec-

onds time was consumed in watching the passing train, although the record is explicit on that phase of the case. The testimony which Respondent moves the Court to include in its Opinion by quotation or summary is as follows:

> "Q. How long was it you were in that position before you felt this flame or the burning process, **how many cars had gone by?** A. **Approximately three or four.**
>
> Q. About how fast would you say that train was moving? A. I would say **thirty-five or forty miles an hour.** It was a rapid speed." (Emphasis supplied; T. 181.)

For grounds of this motion Respondent states: The Court's Opinion makes the length of time plaintiff directed his attention to the passing train, thus leaving the fire "unattended and unwatched" (Opinion, p. 10), a pivotal fact. As to this fact the language presently employed in the Opinion does not give a complete or accurate account of the factual situation, nor permit fair evaluation of plaintiff's conduct. The testimony which Respondent moves the Court to include in its Opinion by quotation or summary is the **only** evidence in the case which does show the length of time plaintiff watched the passing train before being caught by the flames. Such testimony should, therefore, be included in the Opinion either by quotation or summary.

B.

Respondent further requests the Court to modify its Opinion by quoting or summarizing the record facts with reference to the duties plaintiff was required to perform at the time he was injured. The Opinion now singles out plaintiff's duty to attend the fire, but does not make any reference to the fact that at the very time of injury **another duty was imposed by defendant** upon plaintiff to

"put down everything we were doing, get clear of what we were doing and stand and watch the trains go by for hot boxes." (T. 20-21, 88-90.)

For grounds for said motion, Respondent states: The Court in its Opinion completely overlooks the above testimony which we believe is pregnant with significance. This testimony demonstrates that the task of watching the passing trains for hot boxes was not voluntarily assumed by plaintiff, nor was it self-created. It was imposed upon him by defendant. If the performance of it increased plaintiff's peril (the Court holds that it did), then the very imposition of it made defendant's method of doing this work unsafe and dangerous, and it is one of the very important elements of plaintiff's right to recover. Furthermore, it was one of the facts and circumstances to be weighed and appraised by a jury.

For the foregoing reasons, Respondent respectfully moves the Court to modify its Opinion as above indicated.

Respectfully submitted,

Mark D. Eagleton,
Thomas F. Eagleton and
Leland Jones,
3746 Grandel Square,
St. Louis 8, Missouri,
Attorneys for Respondent.

APPENDIX D.

Filed November 28th, 1955.

(R. 453 to 460.)

In the
Supreme Court of Missouri,
Division No. 1.

September Session, 1955.

James C. Rogers,
Plaintiff-Respondent,

vs.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation,
Defendant-Appellant.

No. 44,595.

Appeal from the Circuit Court of the City of St. Louis,
Honorable F. E. Williams, Judge.

Respondent's Motion for a Rehearing, or, in the Alternative, to Transfer to the Court En Banc.

Comes now James C. Rogers, Respondent in the above-entitled cause, and moves the Court to set aside its Opinion, decision and judgment rendered herein on the 14th day of November, 1955, and to grant Respondent a rehearing herein, or, in the alternative, to transfer this case to the Court en banc.

For grounds of these motions, Respondent respectfully states that material matters of law and fact in this case were overlooked and misinterpreted by the Court as shown by its Opinion previously filed herein. Such matters of law and fact are as follows:

I.

The Court through a misunderstanding of the evidence has reached the erroneous conclusion that plaintiff was injured as a result of "an emergency brought about by himself" (Opinion, p. 9) in leaving the fire "unattended and unwatched" (Opinion, p. 10). All the evidence on the point shows that plaintiff, while performing his duty of watching the passing train for hot boxes, looked away from the fire for only two or three seconds before he was overtaken by the flames. **Defendant,** apparently in recognition of this testimony, **did not request** the Court to give any instructions submitting to the jury the issue of whether or not plaintiff was negligent in failing to attend or watch the fire under these circumstances, although defendant did request and was granted a **sole cause** instruction dealing with plaintiff's alleged failure to guard properly his footsteps while escaping from the fire (see Defendant's Instruction No. 2, T. 421-422). The Court through this misunderstanding has decided this whole case on an issue not warranted by the facts and **not submitted by defendant.**

II.

The Court through a misunderstanding of the evidence has reached the erroneous conclusion that plaintiff was injured as a result of "an emergency brought about by himself" (Opinion, p. 9) in leaving the fire "unattended and unwatched" (Opinion, p. 10).

It was defendant who imposed the duty upon plaintiff to watch the passing trains for hot boxes. This was not a duty voluntarily assumed by plaintiff, nor was it self-created. If the performance of it increased plaintiff's peril (the Court holds that it did), then the very imposition of it made defendant's method of doing this work an improper one, and it is one of the very important elements of plaintiff's right to recover. Under Point VI herein, we

enumerate the six elements which made the method of work adopted by defendant an unsafe and dangerous method, and **the imposition of this duty is one of the elements stressed therein.** It seems incongruous to us that defendant can demand of plaintiff that he temporarily divert his attention to another task for as much as two or three seconds and that he can thereafter be condemned for obeying the very instructions given him by defendant.

III.

The Court misinterpreted and misconstrued the length of time plaintiff directed his attention to the passing train. The Court wrongfully assumed that plaintiff left the fire "unattended and unwatched" for a substantial period of time. This assumption is contrary to **all** the evidence in the case. Plaintiff's uncontradicted evidence is that **only three or four cars** of the train (T. 181), that is, one-half or two-thirds of the train (T. 23), passed him before he was overtaken by the flames. Since the train was moving 35 to 40 miles per hour (T. 181), a fact also proved by the uncontradicted evidence, it necessarily follows that plaintiff could not have directed his attention to the passing train for more than two or three seconds before the fire reached him.

The erroneous assumption of fact that plaintiff left the fire "unattended and unwatched" (Opinion, p. 10) for a substantial period of time is material. It is upon that erroneous assumption that the Court concluded that plaintiff faced an emergency "brought about by himself" (Opinion, p. 9) and, therefore, not the result of defendant's negligence.

IV.

The Court misinterpreted and misconstrued the nature of plaintiff's duties: (1) to inspect the passing train for overheated journal boxes and (2) to tend the fire then set

on the shoulder. The Opinion of the Court, in reciting that "plaintiff knew it was his primary duty to watch the fire," misinterpreted plaintiff's testimony as meaning that the duty to watch the fire was then and there more important than the duty to watch the passing train. Such a meaning cannot fairly be given to the testimony of plaintiff, who stated that **defendant had issued standing orders to all section hands, including plaintiff, to drop whatever they might be doing whenever a train passed in order to inspect such trains for overheated journal boxes** (T. 20-21, 88-90). Plaintiff's testimony was **uncontradicted** even though one of the witnesses for defendant was its foreman, from whom plaintiff said he had received the standing orders!

The testimony of plaintiff is uncontradicted as to the nature of the two duties he had to perform in the same interval of time. He had either to watch the fire or to watch the train during this interval. He ran to a point of apparent safety in order to perform the duty imposed on him by defendant, to-wit, watching the train for hot boxes. While the duty of attending the fire may have been primary, it was in no sense exclusive. Both duties were highly important. The nature of the instructions given him by the foreman "to put down everything we were doing, get clear of what we were doing and stand and watch the trains go by for hot boxes" (T. 20-21) must be considered in order to evaluate properly plaintiff's conduct. Certainly reasonable minds could differ on this issue. Therefore, it was the province of the jury to weigh and appraise these facts, not as a matter of hindsight, but under the circumstances present at the time plaintiff was trying to carry out both sets of instructions which were conflicting in their very nature.

V.

The Court's conclusion of law and fact that defendant's negligence, if any, was not the proximate cause of plaintiff's injuries was invalid. It was based upon the misinterpretations and misconstructions of fact set out in Sections I and II preceding. The Opinion held that the emergency which caused plaintiff's injuries was of the plaintiff's own making. Since, however, the uncontradicted evidence proves that plaintiff was obeying the instructions of defendant during the two or three second interval he directed his attention to the passing train, it follows that the Opinion is demonstrably incorrect. This error was an integral part of the holding; it is obvious that the error was material.

VI.

The Court overlooked a theory and the law relied upon by plaintiff in both the trial and the appellate courts. In its Opinion, the Court considered the method of work furnished plaintiff as limited to "the use of the hand torch (in itself)" (Opinion, pp. 9-10). It is apparent from the Opinion that the Court mistakenly understood plaintiff's contention to be that the method of work was dangerous because, and only because, the firing was done by means of a hand torch.

Actually, plaintiff's theory and the law, both of which were overlooked in the Opinion, are that defendant's method of work was comprised of the several following factors: (1) that plaintiff was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (2) that plaintiff was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the plaintiff to be in close proximity (within six feet) of the flame; (3) that plaintiff was required to burn the weeds in such close proximity

to defendant's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward plaintiff; (4) that under the circumstances defendant did in fact operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward plaintiff; (5) that defendant did not provide plaintiff with a path or other means adequate for escape from the fire; **(6) that under all of these circumstances defendant continued to impose the duty upon plaintiff of inspecting and watching the passing trains for hot boxes.**

In overlooking plaintiff's theory and the law, the Court committed a material error by simply holding that there was no evidence "the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds." The Court thereby disposes of the entire case on the basis of this one element alone, and thus it has failed to consider the other five elements above set forth upon which plaintiff relies for recovery.

VII.

The Court misinterpreted and failed to apply properly the principles of law in the case of Bailey v. Central of Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062. The error is material, since the Bailey case, decided by the Supreme Court of the United States and controlling upon this Court, clearly holds that the facts and circumstances such as here involved are to be weighed and appraised by the jury.

VIII.

The Court misinterpreted and misconstrued the case of Kelso v. W. A. Ross Const. Co., 337 Mo. 202, 85 S. W. 2d 527. In discussing the Kelso case, the Opinion overlooked the law of that case. The Kelso case held that the safety of the method of work cannot be judged apart from the place of work and that the safety of the place of work

cannot be judged apart from the method of work. This error is material because the Court in the case at bar attempted to judge the adequacy of **one** of the elements of the method of work without relating it to the place of work and attempted to judge the adequacy of **one** of the elements of the place of work without reference to the method or kind of work in progress.

For the foregoing reasons, Respondent respectfully prays the Court to set aside its Opinion, decision and judgment rendered herein on the 14th day of November, 1955, and to grant Respondent a rehearing, or, in the alternative, to transfer this case to the Court en banc.

Respectfully submitted,

Mark D. Eagleton,
Thomas F. Eagleton and
Leland Jones,
3746 Grandel Square,
St. Louis 8, Missouri,
Attorneys for Respondent.

APPENDIX E.

Order Overruling Motions "to Modify the Opinion," "for a Rehearing, or, in the Alternative to Transfer to the Court en Banc."

Entered December 12th, 1955 (R. 476).

And thereafter and on the 12th day of December, 1955, the following further proceedings were had and entered of record in said cause, to-wit:

James C. Rogers,

Respondent,

vs. No. 44,595.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation,

Appellant.

Now at this day, the Court having seen and fully considered the motions of the respondent for modification of the opinion in the above entitled cause and for a rehearing herein or, in the alternative, to transfer said cause to the Court en Banc, doth order that said motions be, and the same are hereby overruled.

APPENDIX F.

State Courts; Appeal; Certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257.

APPENDIX G.

The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

APPENDIX H.

Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminshed by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U. S. Code, Sec. 53.

APPENDIX I.

Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.

APPENDIX J.

Actions; Limitations; Concurrent Jurisdiction of Courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. April 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989; 45 U. S. Code, Sec. 56.